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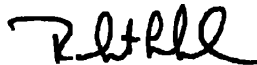
RE: MUR 5799
Senator John S. McCain

After reviewing the allegations contained in the complaint, your client's response, and publicly available information, the Commission, on April 10, 2007, found reason to believe that Senator McCain violated 2 U.S.C. § 441i(e), a provision of the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

Sincerely,



Robert D. Lenhard
Chairman

Enclosures
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondent: Senator John McCain

MUR: 5799

I. BACKGROUND

This matter arises from a complaint filed by Christine Setzer of the Senate Majority Project concerning a fundraising solicitation sent in connection with an event hosted by Spears for Adjutant General, South Carolina Adjutant General Stan Spears' re-election committee. The face of the solicitation states "[y]ou are cordially invited to attend a private reception honoring Adjutant General Stan Spears with special guest United States Senator John McCain." The second page consists of reply cards that contain boxes for donors to check donation amounts ranging from \$100 to \$1,000, followed by a boxed labeled "Other." At the bottom of the reply card is a disclaimer stating:

Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator John McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual funds in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. South Carolina state law allows campaign contributions of up to \$3,500 per election cycle. Registered lobbyists please disregard.

The complainant alleged that Senator McCain violated the "soft money" prohibitions enacted in the Bipartisan Campaign Reform Act ("BCRA"), specifically, 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, which prohibit Federal candidates and officeholders from, among other things, soliciting funds in connection with any non-Federal election unless the funds are in amounts that do not exceed the Federal Election Campaign Act of 1971, as amended (the "Act's"), contribution limits and do not come from prohibited sources. In response to the

1 complaint, counsel for Senator McCain stated that a representative of Senator McCain reviewed
2 a draft of the invitation "to ensure that it included the disclaimers required by the FEC for
3 invitations to state candidate events mentioning federal officeholders."

4 Because a Federal officeholder may not consent to appear in a solicitation that is not
5 expressly and entirely limited to amounts and sources that comply with the Act's contribution
6 limits and source prohibitions, the Commission finds reason to believe that Senator McCain
7 violated 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62.

8 **II. DISCUSSION**

9 Under BCRA, Federal officeholders and candidates for Federal office may not solicit,
10 receive, direct, transfer or spend funds in connection with either Federal or non-Federal elections,
11 unless the funds comply with Federal contribution limits, source restrictions, and reporting
12 requirements. 2 U.S.C. §§ 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61 and 300.62. Specifically,
13 a Federal officeholder or candidate, whether in connection with a Federal or non-Federal
14 election, may not raise funds from individuals that exceed the current limit of \$2,300 per election
15 per candidate,¹ and may not raise funds from corporations or labor organizations.² The

¹ At the time of the alleged violation, the individual contribution limit was \$2,100.

² A Federal officeholder or candidate for Federal office may, however, attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, without restriction or regulation. 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64. In the Explanation and Justification for 11 C.F.R. § 300.64, the Commission noted that the rule "is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves ... the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. § 441i(e)(1)." 70 Fed. Reg. 37,649, 37,653 (June 30, 2005).

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1 Commission defines the term "solicit" to mean "to ask, request, or recommend, explicitly or
2 implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
3 provide anything of value." 11 C.F.R. § 300.2(m).³

4 The Commission has interpreted this prohibition in the context of particular facts
5 presented in several Advisory Opinions regarding Federal candidates' and officeholders'
6 participation in fundraising events where donations outside of Federal contribution limits and
7 source restrictions were sought. See AO 2003-03 (*Cantor*), AO 2003-36 (*Republican Governors*
8 *Association* ("RGA")); see also AO 2003-37 (*Americans for a Better Country* ("ABC"))
9 (superseded by 11 C.F.R. § 106.6 on Nov. 23, 2004).⁴

10 The facts addressed in the *Cantor* Opinion relate to the appearance of Federal candidates
11 and officeholders in publicity preceding an event at which funds would be raised for state
12 candidates. Specifically, the requestors noted that

13 [T]hey would like Representative Cantor to: (1) attend campaign events, including
14 fundraisers, (2) solicit financial support, and (3) do so orally or in writing.
15 Congressman Cantor would like to participate in their campaigns in this manner.
16 Requestors ask for guidance from the Commission about the degree to which
17 Representative Cantor, as a Federal officeholder and candidate, may engage in
18 State and local election activities.
19

³ The Commission adopted this definition of "solicit" as of April 19, 2006, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005). The Commission specifically declined to make changes to the principles set forth in the Advisory Opinions that are applicable here or to initiate a rulemaking to address the issues based on testimony that the principles articulated in these Advisory Opinions are well-understood and that "the community is complying with them." See 71 Fed. Reg. 13,926, at 13,930-31 (Mar. 20, 2006).

⁴ Counsel for Senator McCain properly notes, in response to the complaint in this matter, that Senator McCain is "in the same position as the requestors" in *Cantor* and RGA and therefore may rely on the Advisory Opinions without being subject to sanction. See 2 U.S.C. § 437f (c).

1 In response to the specific question asking whether the Congressman's attendance at the event
2 may be publicized and whether he may participate in the event as a featured guest, the
3 Commission responded:

4 Section 441i(e)(1) and section 300.62 do not apply to publicity for an
5 event where that publicity does not constitute a solicitation or direction of non-
6 Federal funds by a covered person, nor to a Federal candidate or officeholder
7 merely because he or she is a featured guest at a non-Federal fundraiser.

8 In the case of publicity, the analysis is two-fold: First, whether the
9 publicity for the event constitutes a solicitation for donations in amounts
10 exceeding the Act's limitations or from sources prohibited from contributing
11 under the Act; and second, whether the covered person approved, authorized, or
12 agreed or consented to be featured or named in, the publicity. If the covered
13 person has approved, authorized, or agreed or consented to the use of his or her
14 name or likeness in publicity, and that publicity contains a solicitation for
15 donations, there must be an express statement in that publicity to limit the
16 solicitation to funds that comply with the amount limitations and source
17 prohibitions of the Act.

18 AO 2003-03 (Response to Question 3.c) (citations omitted).

19 The Commission revisited the issue of covered persons' participation as featured guests
20 in RGA. The specific question there was:

21 1.b. May a covered individual participate [as a featured guest at an RGA
22 fundraising event] by having his name appear on written solicitations for an RGA
23 fundraising event as the featured guest or speaker?

24
25 After restating the two-step analysis from the *Cantor* Advisory Opinion, the Commission
26 answered:

27 A Federal candidate may not solicit funds in excess of the amount limitation or in
28 violation of the source prohibitions of the Act. If the covered individual approves,
29 authorizes, or agrees or consents to be named or featured in a solicitation, the
30 solicitation must contain a clear and conspicuous express statement that it is
31 limited to funds that comply with the amount limits and source prohibitions of the
32 Act.

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1 AO 2003-36 (Response to Question 1.b).

2 Thus, if a Federal officeholder or candidate approves, authorizes, or agrees or consents to
3 be named or featured in a solicitation, then the entire solicitation must be limited to Federally
4 permissible funds. The Commission further explained this restriction in RGA, stating that a
5 disclaimer will not inoculate a covered person who approves his or her appearance in a
6 solicitation that explicitly seeks funds beyond the limits and prohibitions of the Act.
7 Specifically, the Commission explained that a disclaimer is inadequate where, as here, the
8 publicity or other written solicitation asks for funds in excess of the Act's contribution limits or
9 from prohibited sources:

10 Although Advisory Opinion 2003-03 [*Cantor*] might be read to mean that a
11 disclaimer is required in publicity or other written solicitations that explicitly ask
12 for donations 'in amounts exceeding the Act's limitations and from sources
13 prohibited from contributing under the Act,' that was not the Commission's
14 meaning. The Commission wishes to make clear that the covered individual may
15 not approve, authorize, agree, or consent to appear in publicity that would
16 constitute a solicitation by the covered person of funds that are in excess of the
17 limits or prohibitions of the Act, regardless of the appearance of such a
18 disclaimer.

19
20 AO 2003-36, at n.9.

21 Subsequently, the Commission again considered the involvement of Federal officeholders
22 or candidates in fundraising for non-Federal elections in the ABC Advisory Opinion. In ABC,
23 which primarily addressed the allocation of expenses by nonconnected committees and was
24 superseded when the Commission enacted new regulations regarding the allocation of certain
25 expenses (*see* 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004)), the requestor asked if Federal
26 officeholders or candidates could be named as "honored guests" or "featured speakers" at

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1 fundraising events for ABC's non-Federal account. The Commission, citing to both the *Cantor*
2 and RGA Advisory Opinions, stated:

3 [A] candidate's consent or agreement to be mentioned in an invitation as an
4 honored guest, featured speaker or host, where that invitation is a solicitation,
5 constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents
6 to be named in a fundraising solicitation as an honored guest, featured speaker or
7 host, or if the invitation constitutes a solicitation for any other reason, then the
8 solicitation must contain a clear and conspicuous statement that the *entire*
9 *solicitation* is limited to funds that comply with the amount limits and source
10 prohibitions of the Act.

11
12 AO 2003-37, at 18 (emphasis added).

13 In sum, to comply with the soft money prohibitions of BCRA, Federal officeholders and
14 candidates must adhere to the following requirements if and when they approve, authorize, agree
15 or consent to appear in a written solicitation in connection with the election of state candidates:

- 16 1. A Federal officeholder or candidate may appear in written solicitations in
17 connection with the election of state candidates, so long as the solicitation is
18 expressly and entirely limited to amounts and from sources that comply with
19 the Act's contribution limits and source prohibitions.
- 20 2. If a written solicitation in connection with the election of state candidates asks
21 for donations, but does not specify an amount, a Federal officeholder or
22 candidate may appear in the written solicitation provided it contains express
23 language stating that the Federal officeholder or candidate is only soliciting
24 amounts that comply with the Act's contribution limits and source
25 prohibitions.

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1 3. However, if a written solicitation in connection with the election of state
2 candidates explicitly asks for donations of funds in amounts exceeding the
3 Act's contribution limits or from prohibited sources, then a Federal
4 officeholder or candidate may not appear in the solicitation regardless of
5 whether there is an express statement limiting the Federal officeholder or
6 candidate's solicitation to funds that comply with the amount limits and
7 source prohibitions of the Act.⁵

8 The only limitation placed on the solicitation at issue in this matter was that it was not
9 seeking contributions from "Guard members or registered lobbyists." *See* Attachment 1. The
10 solicitation did not contain any language stating that the entire solicitation was limited to
11 Federally permissible sources. *See id.* In addition, although the solicitation sought specific
12 amounts only up to \$1,000, it also included an "other" space, constituting a failure to limit the
13 solicitation to federally-permissible amounts. While the solicitation also included a disclaimer
14 indicating that "Senator McCain is not soliciting individual contributions in excess of \$2,100,
15 nor is he soliciting corporate, labor union or foreign national contributions," this disclaimer
16 failed to limit the *entire* solicitation to Federally-permissible funds. *See supra*, pp. 3-7.
17 Furthermore, the next sentence advised solicitees that "South Carolina state law allows campaign

⁵ An exception to this bar exists for situations where a Federal officeholder or candidate is "merely mentioned" in the text of a solicitation. Such "mere mention" would not, in and of itself, constitute a solicitation of non-Federal funds by the Federal officeholder or candidate. *See* AO 2003-36, at 6. At the open meeting at which the Commission discussed RGA, Commissioners stressed that this was a narrow exception that would cover, for example, instances where a state candidate sought and received permission from a U.S. Senator to refer in a solicitation to the fact that he or she worked as a staff member to the Senator. *See* Audio Tape Discussion of AO 2003-36 (Jan. 7, 2004). In any event, the prominent references to Senator McCain as "Special Guest" and "Speaker" for this event go well beyond "mere mention," and an officeholder's appearance in such capacities is specifically addressed in AO 2003-36.

1 contributions of up to \$3,500 per election cycle," implying that contributors could exceed the
2 Federal contribution limit. A Federal officeholder may not inoculate a solicitation of non-Federal
3 funds by "reciting a rote limitation, but then encouraging the potential donor to disregard the
4 limitation." See AO 2003-03. It therefore violated BCRA's prohibitions on soliciting non-
5 Federal funds for Senator McCain's name or likeness to appear in this invitation as a featured
6 guest or speaker since he approved, authorized, agreed, or consented to be featured, or named in,
7 the invitation. See *supra*, p. 2.

8 **III. CONCLUSION**

9 Based on the above, the Commission finds reason to believe that Senator John McCain
10 violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

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